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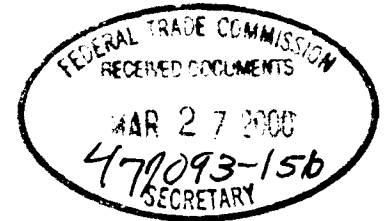
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MCDERMOTT, WILL & EMERY

March 23, 2000

Via First Class Mail

Donald Clark
Secretary of the Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N. W.
Washington, D. C. 20580



Re: Return of Documents and Information Submitted To the
FTC Pursuant to the Commission's Order to File Special Report

Dear Mr. Clark:

On Coors Brewing Company's ("Coors") behalf, I write to request the return of the documents and other information, both originals and copies ("Materials"), that Coors submitted to the Federal Trade Commission ("FTC" or "Commission") pursuant to the August 6, 1998 Order to File Special Report ("FTC Request"). Coors was happy to assist the Commission in preparing its report to Congress regarding the alcohol beverage industry's self-regulatory efforts.

Now that the Commission has completed its investigation and submitted its report to Congress, Coors wishes to retrieve the Materials. The Commission may return the information Coors provided in response to the FTC Request because no pending Freedom of Information Act ("FOIA") request covers the Materials. Moreover, the FTC need not retain the Materials for production in response to future FOIA requests because the Materials are exempt from release under FOIA pursuant to Section 6(f) of the Federal Trade Commission Act and Exemption 4 of the FOIA Act. In these circumstances, basic fairness and the FTC's interest in future industry cooperation dictate that the Commission return the Materials to Coors.

I. Retention of the Information is Not Necessary.

A. The FTC has Completed Its Investigation and Submitted Its Report to Congress.

The FTC began its investigation pursuant to Section 6(b) of the Federal Trade Commission Act when it issued the FTC Request to various members of the alcohol beverage industry. Coors and other industry members responded to the Request in October 1998.

In September 1999 the FTC completed its investigation with a release of a report entitled "Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers." Given that the Commission has completed its investigation and reported to Congress, the FTC no longer needs the Materials and should therefore return the Materials to Coors.

B. The FTC Need Not Retain the Materials for a Future FOIA Request.

The FTC has no reason to retain the Materials. No pending FOIA request covers the Materials. We understand that Beer Marketer's Insights has withdrawn its FOIA request as it pertains to Coors, and we know of no other pending FOIA request. Thus, the FTC is not obliged to retain the Materials. Moreover, the Commission should return the Materials because the FTC would not be obliged to produce the information pursuant to any future FOIA request.

The Federal Trade Commission Act exempts from disclosure "any commercial or financial information which is obtained from any person and which is privileged or confidential." 15 U.S.C. § 26(f) ("Section 6(f)"). FOIA exempts "commercial or financial information obtained from a person privileged or confidential." 5 U.S.C. § 552(b)(4) ("Exemption 4"). The information the Commission currently possesses constitutes confidential commercial or financial information relating to: (1) audience composition; (2) the Report Of Independent Auditor: Nielsen Media Research, Inc. Coors Brewing Company Advertising Placements ("Independent Auditor's Report"); (3) Coors' internal advertising guidelines and employee training; and (4) complaints and inquiries about Coors' advertising and responses to those complaints. FOIA would not require the Commission to produce this information, making retention of the Materials unnecessary. The Commission should therefore return the Materials to Coors.

1. The Materials are Confidential.

Confidential information is exempt from disclosure under FOIA. *See* 15 U.S.C. § 46(f); 5 U.S.C. § 552(b)(4). Information "of a kind that the provider would not customarily make available to the public" is confidential and not subject to disclosure. *See Critical Mass Energy Product v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Because Coors does not customarily release the type of information in the Materials to the public, the confidentiality requirements of Section 6(f) and Exemption 4 are met in these circumstances.

Coors zealously safeguards the information contained in the Materials. Coors voluntarily provided the Commission with raw data detailing the audience composition for Coors' radio and television advertising, along with correspondence directly related to and referencing that data. Coors also submitted portions of its Independent Auditor's Report (including notes and related documents) discussing Coors' national advertising placement and whether that placement complied with internal and industry guidelines.

The submitted audience composition and advertising compliance materials are highly confidential because they reveal Coors' demographic advertising strategies. Disclosure of this data would place Coors at a competitive disadvantage. For instance, Coors' competitors discovering Coors' target markets could proceed to unfairly compete with Coors in those markets. To take another example, advertisers armed with detailed knowledge of Coors' advertising strategies could raise prices for media reaching those markets.

In response to the FTC Request, Coors also submitted information detailing its internal guidelines for responding to complaints and information describing the advertising-related training Coors provides to its employees. Coors' documents in the FTC's possession also describe individual complaints and inquiries, and Coors' responses to those complaints and inquiries.

Coors does not disclose such internal guideline and complaint information to the public.¹ Release of this information would place Coors at a competitive disadvantage. For example, if a competitor discovered that Coors' internal guidelines prohibit advertising in a particular medium, that competitor could use the information to obtain advertising for a lower price in that medium. Similarly, release of such information could cause advertisers to misrepresent or at least "spin" facts about its audience in order to gain Coors business.

In short, the Materials contain highly confidential information that, if disclosed, would gravely damage Coors. Coors does not customarily release such information to the public. The FTC should therefore return the Materials to Coors.

2. The Information is Commercial or Financial.

Section 6(f) and FOIA Exemption 4 require that exempt material be commercial or financial in nature. *See* 15 U.S.C. § 46(f); 5 U.S.C. § 552(b)(4). The terms "commercial" and "financial" in the exemption should be given their ordinary meanings. *See, e.g., Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982). "Commercial" means "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). "Commerce" is defined as "[t]he buying and selling of goods." Webster's II New Riverside Dictionary (Revised Ed. 1996). "Financial" describes information related to the "management of monetary affairs." *Id.* (defining "finance").

Coors' radio and television audience composition data and the Independent Auditor's Report are commercial information within the meaning of Section 6(f) and FOIA Exemption 4. The materials contain data, research, and other information regarding Coors' advertising, which clearly relates to the buying and selling of Coors' products. *Cf. Landfair v. United States Dep't of*

¹ Although Coors responds to individual members of the public who complain or inquire about Coors' advertising, it does not disclose general information relating to complaints or inquiries about Coors' advertising.

the Army, 645 F. Supp. 325, 327 (D.D.C. 1986) (business sales statistics and research data are commercial information).

Coors' guidelines for responding to advertising complaints and employee training material related to advertising also contain commercial information within the meaning of Section 6(f) and FOIA Exemption 4. Such information clearly relates to the buying or selling of Coors' products. Likewise, the documents summarizing complaints about Coors' advertising and Coors' responses to those complaints (including Coors' actual response letters) constitute commercial information because they plainly deal with the buying and selling of Coors' products.

II. To Ensure Future Industry Cooperation, the FTC Should Return the Materials.

Sound public policy also dictates that the Commission return the Materials in order to ensure future cooperation with FTC investigations. The cover letter attached to the FTC Request assured Coors that the FTC would "disclose data and other information collected by the 6(b) reports *only in an anonymous or aggregate form*." August 6, 1998 Letter from Richard F. Kelly and Janet M. Evans to W. Leo Kiely, III at 1 (emphasis added) (attached at Tab 1). In addition, on several occasions the Commission's staff assured Coors that none of the information Coors produced would be subject to disclosure under FOIA. In reliance on these assurances, Coors *voluntarily* complied with the FTC Request and cooperated fully with the Commission. To encourage Coors and others to cooperate in the future, as well as to satisfy basic notions of fairness, the FTC should return the Materials to Coors.

If the FTC releases information voluntarily submitted despite assurances by the Commission that it would not do so, it will substantially impair the Commission's ability to collect information. *See Landfair v. United States Dep't of the Army*, 645 F. Supp. 325, 328 (D.D.C. 1986) (holding that a promise of confidentiality renders the disclosure of information more likely to impair the government's ability to obtain information). Indeed, FOIA recognizes the need of government policymakers to have access to commercial and financial data:

Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (citing legislative history in support of this purpose).

III. Conclusion.

The Materials contain highly confidential information safeguarded by Coors. The Commission no longer has any reason to retain the Materials.

- The Commission completed its investigation and submitted its report to Congress.

Donald Clark
March 23, 2000
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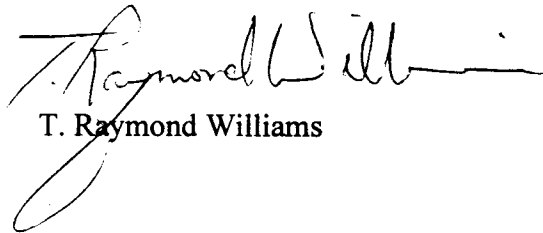
- No pending FOIA request prohibits the FTC from returning the materials.
- The documents are exempt from production under FOIA.

Furthermore, in light of the FTC's assurances that it would not disclose the materials, fairness and the FTC's interest in ensuring future cooperation dictate that the Commission return the Materials to Coors.

* * *

We would be happy to discuss these issues at your convenience. Do not hesitate to contact me at (202) 756-8140.

Sincerely,

A handwritten signature in cursive script, appearing to read "T. Raymond Williams".

T. Raymond Williams

Attachments

cc: Janet M. Evans, Esq. (by facsimile)
Terance Micek, Esq. (by facsimile)

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